IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 790 OF 1989

1. Lahu Kamlakar Patil]
age 25 years,]
2. Baliram Shankar Mhatre]
age 20 years]..Appellants
Both residents of Kolkha Peth](Ori. Accused
Taluka Panvel, Dist: Raigad] Nos.2 & 3)

versus

The State of Maharashtra ..Respondents

Mr. S. V. Marwadi for the Appellants - Original Accused Nos. 2 and 3.

Mr. V. B. Konde-Deshmukh, APP for the Respondents - State.

CORAM : D. G. DESHPANDE, &
S. R. SATHE, JJ.

DATE : 8TH FEBRUARY, 2007.

ORAL JUDGMENT : (Per. D. G. DESHPANDE, J.) :

1. This Appeal is filed by the appellants - original Accused Nos. 2 and 3, who were convicted for offences punishable under Section 302, 147, 148 and 452 of the I.P.C. and sentenced to suffer life imprisonment plus fine. The conviction was given by the 2nd Additional Sessions Judge, Raigad, Alibag, by judgment dated 18.11.1989. There were four more

accused prosecuted along with present appellants but they were acquitted by the trial court.

2. We heard Mr. Marwadi advocate for the appellants - original accused Nos. 2 and 3 and learned APP for the State, at length.

3. As per the prosecution case the person who was murdered was Sriram @ Bhau Harishchandra Patil. He was friend of Janardan Bhonkar (P.W. 2). The complainant in this case was one Chandrakant Phunde (P.W.1) who was a rickshaw driver. On 19.2.1988 Chandrakant was going by his rickshaw from Rasayani Phata to Panvel. It was hired by Janardan (P.W. 2) in the evening at 5.30 p.m. Janardan (P.W. 2) had some work at Somatane while he was returning to Panvel, deceased Shriram @ Bhau met him. Chandrakant stopped the rickshaw. Janardan agreed and then the deceased was taken in the rickshaw. They went to Gemini Tailors on the request of deceased Sriram @ Bhau, from where he took some stitched clothes and when they were going to Panvel via Kolkha Phata and on the way near Palspe phatas, the rickshaw was stopped at Milan Hotel for some snacks.

4. Further, according to the prosecution when all the three persons were in the hotel, group of 10-15 people entered the hotel and started shouting and were armed with weapons like swords, iron bars and sticks . The Appellants - original accused Nos. 2 and 3 were amongst them. Accused No.3 Baliram had a sword and accused No. 2 Lahu had a iron bar. Baliram gave a blow of the sword on the head of deceased Bhau, others also assaulted him and accused No.2 gave a blow of iron bar on the head of Bhau. When Janardan tried to resist, he got a hit on his right hand finger because of the blow of sword. There was a commotion in the hotel, people ran helter and skelter, so also P.W. 2 Janardan. The accused ran away from the spot.

5. Prior to this incident, it is the case of the prosecution that the accused were on the look at of deceased Bhau. They had made enquiry from one Vadapavwala and Shantaram Jadhav who disclosed as to where deceased Bhau had gone. Shantaram in turn gave this intimation to the father of deceased Bhau and the father of deceased sent one Prakash in search of deceased Bhau. Prakash went to the hotel

and found that Bhau was injured and then Bhau was removed to the hospital where he was declared dead.

6. Complaint regarding this incident was lodged by one Chandrakant (P.W. 1). The statement of eye witness Janardan (P.W. 2) was recorded two days after. After the investigation the accused were arrested, spot panchnama was seen, incriminating articles were recovered from the spot. Statement of the accused under Section 27 were recorded. Discovery is made and charge sheet was filed.

7. The trial court after scrutiny of evidence found that there was evidence only against appellants - original accused Nos. 2 and 3 and no evidence against other accused. Therefore, the appellants - the original accused Nos. 2 and 3 came to be convicted and others were acquitted. Hence, this appeal by the appellants - convicted accused.

8. Mr. Marwadi for the accused, firstly, contended that there is no evidence worthy of consideration for convicting the appellants - accused in this case. According to him, P.W. 1 Chandrakant did not support the prosecution and he

was declared hostile. Evidence of P.W. 2 Janardan should not have been relied upon by the trial court because even though Janardan aged about 32 years at the time of the incident was an eye witness to the incident, he did not report the matter to the police. He hid himself throughout the night, came back to his house in the earlier hours of the morning. Then even though he had a telephone at his house, he did not contact the police nor informed about the incident to any of the members of his house but directly went to Pune. He stayed there at Pune, came back on the next day morning at about 8 a.m. to 8.30 a.m. when his wife told that police ha d come to meet and then he gave his statement. Mr. Marwadi therefore contended that the conduct of the so-called eye witness P.W. 2 Janardan was most unnatural, and, therefore the court should have disbelieved him totally and completely.

9. Mr. Marwadi further contended that according to the evidence of Janardan P.W. 2, incident has occurred at Milan Hotel which was on the Bombay Pune Express Highway as admitted by this witness and others. There were number of passengers taking their refreshment in the hotel. The staff of

the hotel was there including cashier and waiter. Many buses were standing outside with their passengers because passengers in those buses were taking refreshments. But surprisingly enough according to Mr. Marwadi for no explanation whatsoever an Investigating agency did not record the statement of any of the waiters or staff of the hotel or any other passenger. In such a situation according to Mr. Marwadi it was wholly improper to rely upon the solitary statement of P.W. 2. Thirdly, Mr. Marwadi contended that the prosecution has not brought out any motive for the assault. The so-called motive or previous enmity was denied by the father of the deceased regarding the evidence of Prakash Harishchandra Patil (P.W. 5) that he saw the accused going out of the hotel with arms in their hands was an improvement finding place in the original statement of Prakash (P.W. 5). Mr. Marwadi therefore contended that when the complainant P.W. 1 has turned hostile and did not support the prosecution in respect of the complaint and when the evidence of P.W. 2 was highly suspicious then this was a case of giving benefit of doubt to the Appellants - accused. Mr. Marwadi also relied upon the judgment of the Supreme Court

reported in **AIR 1979 S.C. 697 Panda Nana Kare vs. State of Maharashtra** on the point that if the solitary eye witness immediately does not disclose the identity of the assailant to the person assembled nor to the physicians who attended the deceased, nor to the victim's real brother who lodged FIR and when he disclosed identity at a belated stage, conviction could not be based on the testimony of eye witness nor on the testimony of those witnesses who asserted that the eye witness told the name of the accused to them immediately after occurrence. The Supreme Court therefore allowed the appeal of the accused and set aside the conviction and acquitted the accused.

10. On the other hand, the learned APP pointed out that even though P.W. 1 the first informant was declared hostile, FIR was proved by the police officer. P. W. 1 has in his statement given the name of P.W. No.2 as an eye witness and if out of fright, P.W. 2 did not disclose the incident to anybody and directly went to Pune and on the next day i.e. on the 3rd day goes to the police or police call him and disclosed the incident then there is nothing unnatural. Regarding non

examination of any of the passengers who were taking their refreshment in the Milan Hotel by the Investigating Officer, the learned APP contended that passengers are firstly interested in going to place of destination, they may not be interested in getting themselves involved in said police case. So far as non examination of waiters and other persons connected with Milan Hotel who was present there, the learned APP contended that when other witnesses were available it might be that the I.O. did not find it necessary to record their statements during investigation.

11. Learned APP further contended that as per the post mortem notes, which were taken on record by reason of admission by the accused, that the deceased Bhau had sustained injuries on his head, the use of weapon by both these accused was proved along with the evidence of the prosecution regarding attempt by the accused to search for the deceased Bhau, he therefore contended that conviction of the Appellants - accused was proper and did not require any interference.

12. In view of these submissions, it is

necessary to go through the evidence. P.W. 1 Chandrakant is the first informant. No doubt he was declared hostile by the prosecution but he is the person who went to Panvel Police Station and he immediately lodged the report. He admitted signature on the report and the fact of lodging of the report by P.W. 1 is proved by the evidence of P.W. 6 Dileep Panse Inspector at Panvel Town Police Station. This witness before he was declared hostile has stated that he was doing business of plying the rickshaw. On the date of the incident he was coming from Rasayani Phata to Panvel Phata at about 6 to 6.30 p.m. He reached near Kolkhe Phata. One Bhau signalled him to stop. At that time Janardan (P.W. 2) was in the rickshaw. Janardan (P.W. 2) told P.W. 1 Chandrakant to take that Bhau in the rickshaw and therefore Bhau was taken in the rickshaw. Then they proceeded in the direction of Panvel. Bhau went to shop of tailor to give measurements and came back with stitched clothes for him. Then when they reached Palspe Phata, Bhau said that we shall take some snacks at Milan Hotel and therefore P.W. 1 dropped them there. Both deceased Bhau and Janardan P.W. 2 went inside the hotel to take tea, but after some time he was called in the

hotel. Therefore, according to P.W. 1 when he was sitting by their side, 8 - 10 boys came, they started assaulting with Lathis and iron bars. He got scared and ran away. He did not see anything. But he was taken to the police station and he lodged his complaint. His signature was identified by him as 'A' and stated that the contents were already written.

13. Counsel for the accused contended that if this witness is declared hostile by the prosecution, no portion of his evidence should have been relied upon by the court. We will consider this aspect subsequently. Other witness is Janardan (P.W. 2). He is an eye witness. He has stated that on 19.2.1988 in the evening at 5.30 p.m. He had hired rickshaw of P.W. 1 Chandrakant, went to Somatane, returned to work shop. Near the bus stop he met Bhau - deceased. Janardan stopped the rickshaw and took Bhau in his rickshaw as Bhau wanted to go to Panvel. Then as desired by Bhau Janardan and Bhau went to Gemini Tailors from where deceased Bhau took stitched clothes. Then Bhau expressed that he wanted to go to Pune and therefore P.W.2 Janardan should drop him at Kolkhe. When they were in

rickshaw, Bhau expressed that they will have some snacks at Milan Hotel. Therefore, P.W.2 Janardan and deceased Bhau went to Milan Hotel and ordered Omlet Pav. At that time 10-15 people entered the hotel. They started shouting loudly. P.W. 2 Janardan turned back and saw sword in the hand of one person when P.W. 2 tried to resist, he received injury on the nail of the right hand finger. But immediately that person gave another sword blow on the head of Bhau and another person gave blow of iron bar on his head. At that time persons were shouting as "Bali, beat, Lahu beat". P.W. 2 has stated that Lahu gave blow of sword on the head of Bhau and Bali gave blow of iron bar on the head of Bhau. He identified those two persons Lahu and Bali. He got scared and ran away but before that he saw that deceased Bhau fell down on his stomach and he was bleeding from his head after the assault.

14. The evidence of this witness was seriously challenged and criticised by Mr. Marwadi on the ground that the witness though had seen the incident, had no reason to hide himself till early morning, then how he could go to his house coolly, change clothes and to go to Pune, stayed there for

one day and after his return go to the police station.

15. It is true that the witness has admitted that after he got scared, he hid himself till morning. Then he went home in the morning, changed his clothes and went to Pune and returned back to Panvel after one day. He also told that upon his return his wife told him that police had come and that Bhau was dead. Thereafter, the witness went to the police Station. In the cross-examination witness has also admitted that there was a telephone at his house but he did not give any information on phone to the police. He has also stated in the cross examination that he went to his house in the morning hours between 5.30 or 6.00 a.m. and that he did not tell the incident to the police and relatives and not even to his family members. He also admitted that he did not try to contact any police officer at Pune or to his relatives.

16. Mr. Marwadi also contended that even if according to this witness he had received injury to his nail, witness was not referred to the doctor for examination of that injury. Therefore, according to

Mr. Marwadi the conduct of this witness is most unnatural which makes his evidence totally unreliable.

17. We are not in agreement with the submissions made by Mr. Marwadi. The most important thing that supports the evidence of this witness P.W. 2 that the fact that in the FIR lodged by P.W. 1 Chandrakant the witness has been named as an eye witness. It is true that P.W. 1 is declared hostile but there is no rule of law that evidence of hostile witness should be totally disbelieved. P.W. 1 has supported the prosecution till the point of actual assault. But he has not given any specific role to anybody nor has identified the accused. However, the fact remains that P.W. 1 Chandrakant, P.W. 2 Janardan and deceased Bhau had gone in the manner stated by both P.W. 1 and P.W. 2 to Milan Hotel, they were taking snacks and at that time assault was committed. If P.W. 2 was not there on the spot, P.W. 1 had no reason to give his name in the FIR. P.W. 1 has admitted his signature on the FIR. Recording of FIR is proved by I.O. as stated by P.W. 1 and therefore if the name of P.W. 2 figures in the FIR and if story given by P.W. 2 is

supported by P.W. 1 up to the point of actual assault then the trial court was fully justified in relying upon the evidence of P.W. 1 and P.W. 2 so far as it relates to the present accused Nos. 2 and 3.

18. It is true that the behaviour of this witness after the incident is rather queer, but his explanation that he was frightened because of the attack and therefore he hid himself till morning and then went to Pune and after return from Pune he went to the Police station after his wife told him that police had come to make enquiry, cannot be said to be so unnatural as to doubt his presence at the spot as an eye witness. People in such circumstances behave differently. There is no hard and fast rule that every one witnessing such a ghastly attack should have courage to immediately go to police. Therefore, two things that have come on record that mentioning the name in the FIR of P.W. 2 Janardan by P.W. 1 Chandrakant and wife of P.W. 2 Janardan telling him that police had come, clearly shows that it was from the FIR that the police learnt that this witness P.W. 2 was an eye witness to the incident.

19. The other corroborating circumstance on record is the existence of injuries on deceased Bhau. Post mortem report (Exhibit 37) in Column 17 has noted three injuries first is incised wound left perital area 5" x 1" x - brain deep, second injury incised wound over left occipital area and in continuation with injury No.1 and third injury incised wound over occipital area. This post mortem report has gone into evidence as admitted by the accused and therefore there was no question of examining the doctor. Specific injuries noted in the post mortem report corroborate the testimony of P.W. 2 Janardan.

20. Learned APP contended that the prosecution has examined three witnesses, in addition, P. W. 3 Shantaram Jadhav, P.W. 4 Baburao Patil and P.W. 5 Prakash Patil. P. W. 3 Shantaram is doing the business of Vada Pav. He has stated that on 19.2.1988 at about 8.15 p.m. all the six accused came to his Vada Pav Centre and accused No.3 Baliram asked where deceased Bhau was. This witness was threatened that if he does not tell the whereabouts of Bhau, his stall would be burnt. The witness has stated that he got scared and closed his stall and

informed about the incident to P.W. 4 Baburao - paternal uncle of Bhau. P.W. 4 Baburao has stated that P.W. 3 came to him on that day and informed that accused were searching for Bhau and then P.W. 4 asked P.W. 5 Prakash to go and see whether Bhau was on his stall and if he was there he should bring him at home and accordingly P.W. 5 Prakash went in search of Bhau. P.W. 5 has stated that as informed to him by P.W.4 he also along with his servant Akram went on motorcycle to search for Bhau and when he reached Milan Hotel he saw all the accused persons running away with arms i.e. accused Bali having sword and others having iron bars and sticks. He entered the hotel and found that Bhau was lying in the pool of blood.

21. Story given by Prakash that he reached Milan Hotel, he saw the accused coming out with weapons in their arms was not even sufficient to inspire the confidence. We do not find any perversity in the finding. Therefore, even if the evidence of P.W. 3, 4 and 5 is totally disregarded, evidence of P.W. 1 and 2 coupled with their medical evidence was rightly found sufficient by the trial court for forming the basis for conviction of the accused.

There is one more circumstance that gave credence to the story as given by P.W. 1 and 2 and seizure of newly stitched clothes, which he was having with him after taking them from Gemini Tailors as per panchnama Exhibit 33. This panchnama is admitted by the defence and therefore exhibited. This will clearly show that story given by P.W. 1 and 2 that at the instance of Bhau they went to tailor is true and genuine.

22. It may be the trial court has believed the evidence of P.W. Nos. 3, 4 and 5 as giving corroboration to the story of P.W. 1 and 2 but we are not inclined to accept the reasonings given by the trial court.

23. According to the prosecution, iron bar was recovered from accused No.1. This fact is proved by the prosecution through P.W. 7 Dnyaneshwar Patil who is a witness to the seizure memo Exhibits 25 and 26 respectively. He has stated that on 26.2.1988 he was called by Panvel Police to Panvel Police Station. From there he was taken to Taloja Police Station. Accused No. 1 was present at that police station. He made a statement that he would produce

the iron bar, which he had kept in his house. His statement was recorded. In his presence he signed it along with other panch and the police officer as per Exhibit 25. The accused No.1 led the police party to his house. There was Tulsi Vrindavan at one side in the house of accused No.1 and there was fuel to the other side. Accused No.1 went to the fuel and removed some of the wood and took out blood stained iron bar. It was seized under a panchnama Exhibit 26. There is nothing in the cross examination to disbelieve this witness. Witness admitted in the cross examination that fuel and Tulsi Vrindavan was outside the house and fuel was kept in an open space. From this, it is tried to be suggested that the recovery is from the open space. We are not in agreement with the submission because the fuel was in the premises of the accused No.1 and he pointed out how it was hidden below the wood. The clothes which the deceased Shriram Bhau was carrying were also recovered by the police under panchnama Exhibit 33. There is panchnama of scene of offence Exhibit 35 which mentions that in Milan Hotel there is pool of blood on the floor, samples were taken. Under Panchnama Exhibit 36 clothes of the deceased Shriram Bhau were seized. They are

white full shirt blood stained, black pant blood stained, underwear and black colour silky cord. It appears that no investigating officer in that sense of the term was examined. There is no C.A. report on record.

24. It is however clear from the aforesaid discussion that the Judgment and conviction of the trial court convicting Appellants - Original Accused Nos. 2 and 3 for the offences under Section 302, 147, 149 of the Indian Penal Code, is correct. We do not find any infirmity in the said judgment. We have already discussed the evidence of important witnesses and there is no reason to disbelieve them, as stated above. Therefore, this appeal is to be dismissed.

25. In the result, we pass the following order:

ORDER

. Appeal is dismissed.

. Judgment of the conviction and sentence imposed upon the Appellants - Original Accused Nos.

2 and 3 passed by the trial court is maintained as it is. Their bail bonds stand cancelled.

. Appellants - Original Accused Nos. 2 and 3 to surrender before the trial court within four weeks from today to undergo the sentence imposed by the trial court. If they fail to surrender, the trial court to take action under the Criminal Procedure Code to sent them to jail for undergoing the sentence.

(D.G. DESHPANDE, J.)

(S. R. SATHE, J.)